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In The
Supreme Court of the United States
October Term, 1984

WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY,

Petitioner,

v.

CARLOS A. LASSO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED BY PETITIONER

I. Whether the opinion below conflicts with decisions of this Court in requiring the employer to satisfy the more exacting "business necessity" burden of proof imposed in disparate impact cases, in an action by a single employee alleging discriminatory employment practices by the employer in filling a state manager's position (the promotion of one qualified employee rather than another qualified employee), but not challenging any facially neutral employment practices, tests or qualification standards which act as a barrier to deny employment opportunities to a disproportionately large number of minorities, in that:

A. The disparate impact allocation of burdens of proof has been applied by this Court only in cases where there was a challenge to facially neutral employment tests or qualification standards which act as a barrier to deny employment opportunities to a disproportionately large number of minorities, whereas the challenge in this case is to the employer's evaluation of the relative qualifications of two qualified employees and its decision to promote one qualified employee instead of another qualified employee;

B. Evidence of only one alleged incident of discrimination against a single employee in a private non class action is insufficient to establish a "routine or regular" policy or practice of discrimination, which is a required element of a disparate impact case and which must be proved by the plaintiff as a threshold matter;

C. The disparate treatment, not the disparate impact, allocation of burdens of proof has been applied by this Court in actions alleging a systemwide "pattern or practice" of discrimination.

RESPONDENT'S REFORMULATION OF THE ISSUES PRESENTED

Respondent respectfully submits that an analysis following the formulation of the issues submitted by Petitioner may not serve the interests of clarity. Therefore, Respondent respectfully submits his argument under the following, abbreviated, framework.

Where the employer filled a state manager's position involving: (1) the promotion of one qualified employee rather than another qualified employee, and (2) an adverse statistical impact in filling that position over a large number of decisions and a long period of time; did the opinion below conflict with decisions of this Court in its treatment of the following issues:

I. Can an individual employee, in a non-class action base his claim on the disparate impact theory?

II. Is a subjective selection process which creates a statistical disparity, when used to determine promotions, a "facially neutral" mechanism within the meaning of the disparate impact cause of action?

III. Where a subjective process denies an employee a promotion, is that a "routine and regular" policy where said process has been used more than 55 times by employer in the relevant time frame?

IV. As a matter of fact, did Respondent in the instant case present a disparate impact case, or a pattern and practice case?

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OPINIONS BELOW

The Opinion of the Court of Appeals vacating the order of the District Court (Pet. App. A1-A9), is reported at 741 F.2d 1241 (10th Cir. 1984). The transcript of the district court trial before the Honorable Edwin Mechem will be cited as Tr., and the Petition for Writ of Certiorari with its Appendix will be cited as Pet. and Pet. App., respectively.

RESPONDENT'S STATEMENT OF THE CASE

Petitioner's Statement of the Case is incomplete and inaccurate at several relevant points. First, petitioner characterizes itself as a "private fraternal benefit society engaged in fraternal activities and also the sale of insurance as an incident of such activities." Pet. at 3. This assertion is a remnant of a failed tactic, attempted at trial to veil Petitioner in the protective cloaks of a private club. The reality is that Petitioner sells insurance, has as its main purpose the sale of insurance, and if its sales meetings can be characterized as "fraternal activities", they are used ultimately to secure the sale of insurance.

Second, is the statement that "in the fall of 1977, a vacancy was about to occur in the state manager's position in New Mexico." Pet. 3. Respondent asks the court to note that this does not read either that "a position came open," or that "the process for selection of a state manager was announced." Although Respondent had stated his interest in a state manager's position, no announcement of the impending opening or any other state manager position

was ever made—Respondent was never informed of when there would be a selection. Tr. at 105, 161, 318. Nor did *anyone* know what the selection criteria would be. Tr. at 149, 167.

Finally, is the incredible assertion that:

> *No evidence was presented to show that any facially neutral tests for employment, aptitude or qualification, or any particularized requirements or standards for promotion were used by Woodmen to deny Hispanics the opportunity for promotion. No evidence was introduced as to any specific instance of discrimination* against any other employee save the isolated decision to make Doney state manager instead of Lasso. *No employment practice was singled out by Lasso as having been routinely or regularly used by Woodmen to deprive Hispanics of opportunities, or which caused any disparities in Woodmen's workforce.*

Pet. at 6 (*Emphasis Added*).

This statement highlights the attempt of the Petitioner to ignore the facts as found by the trial court—those facts upon which the Court of Appeals based its decision. Pet. App. at A7. Although testimony at trial was that "the only thing (company officials) did not come out and say was, we do not want this mexican running for the president of the state for Woodmen of the World," for the purpose of this petition, it must be "assumed" that the selection process for state manager was "neutral". The Court of Appeals stated that:

> there was only one hispanic surnamed state manager of defendant company since 1963 and that out of 55 state managers since 1975, none were Hispanic surnamed persons. I.R. 29-30. One proposed finding, to be based on Lasso's testimony, was that there is a sub-

> stantial disparity between the number of Hispanics working for defendant and those holding high level management positions.

Pet. App. at A5. The Tenth Circuit further stated:

> There was statistical evidence in some detail on the number of lower level Hispanics among the defendant's employees and the lack of high level Hispanics state managers, and on the subjective selection process. Among other things, evidence introduced by plaintiff . . . that defendant in 1977 had 43.75% Spanish people working for the company in the State of New Mexico. In 1978, 41% of the New Mexico work force of the company, which has operated in the State for perhaps some 25 years.

Pet. App. at A7.

This is in keeping with the finding of the district court below that:

> the national origin of Mr. Lasso and the statistical evidence offered at trial regarding the lack of Hispanics in management give rise to an inference of an unlawful discriminatory act by the Society.

Pet. App. at A12.

Thus, the correct characterization of the facts is directly opposed to that presented by Petitioner. The facially neutral selection process for state manager was used by Woodmen to deny Hispanics the opportunity for promotion. Although evidence of a great number of specific instances of discrimination were *factually before the trial court,* the employment practice singled out by Lasso as having routinely and regularly used by Woodmen to deprive Hispanics of opportunities and which caused disparities in Woodmen's workforce was the facially neutral, subjective, non-criteria based selection process for state

managers which was utilized some 55 times by Petitioner in the relevant time frame.

GROUNDS FOR DENIAL OF PETITION

Prior to presenting his argument on the merits of the Petition, Respondent respectfully submits that no basis exists for a grant of the Writ of Certiorari as to the decision of the Tenth Circuit below. As will be shown below, there exists no contradictory opinion within the Tenth Circuit, nor does there exist a split between the Circuits on the issues presented. Finally, no issue is raised in the interpretation of the statute on any point not decided by unanimous Circuits.

I. Can An Individual In A Non-Class Action Employee Base His Claim On The Disparate Impact Theory?

A. The distinction between the causes of action under Title VII

The interpretations of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.*, by this Court, delimit two essential causes of action; disparate impact and disparate treatment. (Pattern and practice of discrimination being a conceptual subset of the disparate treatment action due to the allocation of proof therein.) Of these two, only the disparate impact theory, articulated in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), does not ultimately place the burden on the employee to demonstrate discriminatory intent.

> (G)ood intent or absence of discriminatory intent does not redeem employment procedures or testing

> mechanisms that operate as "built-in headwinds" for minority groups, and are related to measuring job capability.

Id. at 432. This manifests itself, in the trial of an employment discrimination action in a very distinct difference in allocation of proof. Simply put, if an employee seeks only to prove that an action by the employer was intentional discrimination that either injured him (disparate treatment), or that a series of intentional actions injured a group of people (pattern and practice) the burdens and allocation of proof are set forth in *McDonnell Douglas Corp v. Green,* 411 U.S. 792 (1973), *Furnco Construction Corp. v. Waters,* 438 U.S. 567 (1978), and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981) as being:

1. Plaintiff's proof of the Prima Facie case.
2. Employer's articulation of a legitimate non-discriminatory reason for the action.
3. Plaintiff's demonstration that the articulated reason is pretextual.

If, however, the employee alleges that a "built-in headwind" in the selection process has adversely affected a minority group disproportionately, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question. *Griggs v. Duke Power Co., supra* at 432.

This, in the course of trial, alters the burden of going forward with proof. Once the prima facie case has been made, the employer must come forward with more than a mere "articulation" of the reason for the disproportion-

ate effect of the employment procedure—he must demonstrate the manifest relationship, or the business necessity, for retention of the offending procedure. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

B. Election of cause of action

It is a well founded basis of modern fact pleading that a plaintiff may plead alternate, and even conflicting theories of his case. Fed.R.Civ.P. 8(e) (2). In a Title VII action it is not uncommon to find a factual situation in which both disparate impact and disparate treatment have occurred. Consider *Wright v. National Archives & Records Service,* 609 F.2d 702 (4th Cir. 1979) in which an individual sought relief under both theories, and the court clearly spoke to the point. In an action by a single black plaintiff, the court's analysis parallels the treatment of other Courts of Appeal under similar circumstances.

> It is necessary at the outset to identify the particular actions claimed by Wright to be discriminatory and to clarify the appropriate mode of legal analysis to be applied in assessing the claims.
>
> • • •
>
> There has also been some confusion as to whether the claims are properly to be analyzed under the disparate treatment test of *McDonnell Douglas* (citation omitted) or under the "disparate impact" test of *Griggs* (citation omitted), or under both.
>
> If any doubt has existed about the appropriate way to assess Title VII claims that seek to invoke both "disparate treatment" and "disparate impact" theories as alternative grounds for relief, *Furnco Con-*

> *struction Corp v. Waters,* 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978), decided during the pendency of this appeal, has made it clear through the mode of analysis employed in that case that these are rightly treated simply as alternative theories upon which a right to relief under Title VII may be established in a given case. As such, in keeping with the general rules of civil procedure, they may be properly pleaded. Fed.R.Civ.P. 8(e) (2), and if sufficiently supported by evidence, Fed.R.Civ.P. 41(b), analyzed by the trier of fact as alternative grounds of relief. Obviously, as alternative theories and not separate claims they may not be applied to establish multiple violations on the same facts, but short of this no procedural election between them is required of a claimant at either pre-trial, trial, or appellate stages.

See also, Solo Cup Co. v. Federal Ins. Co., 619 F.2d 1178 (7th Cir. 1980); *Chrisner v. Complete Auto Transit, Inc.,* 645 F.2d 1251 (6th Cir. 1981); *Rowe v. Cleveland Pneumatic Co., Numerical Control,* 690 F.2d 88 (6th Cir. 1982); *Wright v. Olin Corp.,* 697 F.2d 1172 (4th Cir. 1982); *Wright v. National Archives & Records Service,* 609 F.2d 702 (4th Cir. 1979).

A hypothetical will clarify the logical basis of this position.

> Mary Smith, a woman seeks employment with ABC. ABC has advertised a job for which Mary is qualified. ABC foreman states to Mary "we ain't ever hired a woman here, and we ain't going to." Mary is rejected for the position. Mary, believing that she may be unable to prove the existence of the foreman's statement makes disparate impact part of her complaint. She does so because she believes that she, as an individual has suffered injury as a member of an affected class. She does not bring it as a class action because she cannot afford to.

> Mary, also believing that company interference with employment records may make it impossible to prove statistical impact on her minority group through the subjective hiring process, (and because her lawyer informs her of the high potential cost of the impact action), also pleads a case of disparate treatment on the basis of the overt statement of the foreman. She also does this because she feels that if she can convince the court of the *intent* to discriminate, her chances of a large back-pay award, which is discretionary, is enhanced by the showing of animus.

In this section of its Petition, Woodmen seems to argue that because Mary argued disparate treatment, she could not have been injured by simultaneous disparate impact as the member of an adversely affected group. If this is the case, we must pity Mary should she suffer any of a number of fates which would deny her access to a class action—for the effect of such a denial would leave her with an injury but no remedy. She could lack the funds for a class action. She could be found to lack either commonality or typicality, or she could be unable to provide adequate protection for the class through her representation. In any of these cases, lacking the ability to bring the class action, she would be unable to seek redress for even the most heinous and overt disparate impact.

From whence does Petitioner's position spring? Certainly not from any decision of this Court or any other. To the contrary, in *Hung Ping Wang v. Hoffman,* 694 F.2d 1146 (9th Cir. 1982) the court stated

> This is *both a disparate impact and a disparate treatment case under Title VII, 42 U.S.C. § 2000e et seq.* First, Wang contends that the promotion selection process permitted a discriminatory impact on minority groups because it is predominantly subjective and

> provides inadequate objective guidelines. Second, Wang contends that application of the selection process to him resulted in discriminatory treatment.

Id. at 1147. (*Emphasis Added*). In that action, the Ninth Circuit, as did the Tenth Circuit in the instant case, first analyzed the impact claim and then the treatment claim, and in finding that each had merit independent of the other, admonished the district court.

> The district court apparently analyzed all of Wang's claims as if they alleged only disparities in treatment. The problems inherent in this approach are readily apparent.

Id. at 1148. The court went on to explain that:

> The district court found that Wang had established a prima facie case of discriminatory treatment under McDonnell Douglas. Under this analysis, the burden then shifted to the Corps to articulate legitimate, non-discriminatory reasons for its failure to promote Wang. The Corps gave two reasons for its actions:
>
> (1) Wang did not qualify under the corps' selection process; and (2) Wang did not possess the requisite language skills. The district court found that the latter rational, lack of language skills, was a pretext.[2]
>
> In analyzing the first rationale, the court assigned to Wang the burden of proving that but for the discrimination he would have been promoted. This is wrong. Wang is challenging the legitimacy of the selection system itself. He cannot be required to prove that he qualified for promotions under a system he alleges to be discriminatory unless the legitimacy of that system is first established. Nor can the plaintiff be required to reconstruct a valid selection system and demonstrate that under third system he would have received one or more of the promotions at issue. The discriminatory impact of the selection system must

> therefore be resolved before Wang's treatment claims are addressed.
>
> • • •
>
> Because the district court assigned an improper burden to Wang on his disparate impact claim, it is impossible to ascertain from the record before us whether Wang proved either disparate impact or disparate treatment by the Corps.

Id. at 1149. As the 10th Circuit stated below:

> [P]laintiff does not challenge the trial court's ruling on the disparate treatment issue. Rather, he argues that the trial court failed to make findings on his disparate impact theory.
>
> • • •
>
> We must agree with plaintiff that the effect of paragraphs 6 and 7 is to allege both disparate treatment and disparate impact claims.

Pet. at A4-5.

In a decision that is almost identical in procedural background to the case at bar, *Rowe v. Cleveland Pneumatic Co., Numerical Control, supra,* the appellate court dealt with an almost identical confusion at the district court level.

> Either theory may be applied to a particular set of facts. Thus, they merely represent alternative foundations upon which liability may be premised. As such they both may be properly pleaded in a plaintiff's complaint, *see,* Fed.R.Civ.P. 8(e) (2) . . . . Moreover, a plaintiff relying on both theories need not elect between them either before or after trial
>
> • • •
>
> The employer thereby delegated the employment decision, as to this group of applicants, to the foreman

> for their subjective evaluations. This Court has previously noted the problems inherent in selection procedures which rely solely upon the subjective evaluations of all white supervisory personnel. (*Citations omitted*). While such procedures are not *per se* violative of Title VII, (*citation omitted*), they do provide a ready mechanism for discrimination, permitting racial prejudice to affect and often control promotion and hiring decisions. (*Citations omitted*). While we recognize that, in some circumstances, employment decisions may be made on the basis of such subjective criteria, any *procedure employing such subjective evaluations will be carefully scrutinized in order to prevent abuse.*

Id. at 92-3.

Thus, Respondent raised both causes of action at trial, and the disparate impact action was properly before the court as a challenge to a facially neutral employment selection process which has an adverse effect on Respondent's minority group.

In *Cooper et al. v. Federal Reserve Bank of Richmond,* — U.S. —, 52 L.W. 4853, (No. 83-185, 1984) this Court's analytical model implies the view that Plaintiffs could elect either or both theories. In that case, intervenors (plaintiffs) were found to have had their claims of pattern and practice resolved in a class action. The court ruled, however, that that decision was not dispositive on the "individual cases". *Id.* at 52 L.W. 4857. Thus, those plaintiffs could have elected either, or both, actions.

C. Having raised disparate impact as an alternative theory an individual need not use the class-action procedure

Petitioner repeatedly, both in this petition and in its appeal to the 10th Circuit, uses the terms "single em-

ployee", "private", and "non-class" as talismen to ward away Respondent's disparate impact claim. When read carefully, these distinctions may be reduced to two misconceptions regarding the statistical case, plus an attempt to argue the facts of this case before an inappropriate forum.

Apparently relying on a theory advanced by the dissenting judge (a district court judge, sitting by designation) in *Hung Ping Wang, supra,* Petitioner seeks to convince this court that

> (individuals should not be allowed to bring disparate impact actions because) This approach, which treats the element of intent as irrelevant, has heretofore been reserved for those situations in which "a business practice, neutral on its face, is shown to have a substantial, adverse impact on some group protected by Title VII", e.g., *Gay v. Waiters' & Dairy Lunchmen's Union,* 694 F.2d 531, 537 (9th Cir. 1982) emphasis added." Application of such analysis where only a single individual is involved is not likely to enhance stability in an area of law already fraught with uncertainty.

Id. at 694 F.2d 1149.

This analysis is simply the confusion of a class injury and the procedural mechanism for bringing a class complaint. *Rowe, supra.* Petitioner would overturn a long line of actions in which an individual or a small group of individuals brought suit on the disparate impact theory due to their injury as part of an affected minority group. *Chrisner v. Complete Auto Transit, Inc.,* 645 F.2d 1251 (6th Cir. 1981); *Rowe v. Cleveland Pneumatic Co., Numerical Control,* 690 F.2d 88 (6th Cir. 1982); *Wright v. Olin Corp.,* 697 F.2d 1172 (4th Cir. 1982); *Wright v. National*

Archives & Records Service, 609 F.2d 702 (4th Cir. 1979); *see also, Solo Cup Co. v. Federal Ins. Co.,* 619 F.2d 1178 (7th Cir. 1980), *and* 3 A. Larson & L. Larson, Employment Discrimination 80.00 (1984) (discussing problems that arise in deciding upon relief in individual disparate impact cases). The net effect of this would be to create the *only* cause of action in the American legal system which would *require* a specific procedural mechanism—the class action—to be used. Thus, the element of "class action" would be added to the cause of action.

Are we to understand then, that if an individual is a businessman whose competitor engages in anti-trust violations he must bring a class action because he is injured along with others; and what of a person injured by the acts of a consumer fraud operation, must he wait for a governmental agency to file a class action on his behalf? This position is patently absurd.

Petitioner would limit the use of the disparate impact action to non-private (read governmental), class action. This is clearly incorrect. As the court below stated,

> We are not persuaded by defendant's argument that a disparate impact claim may not be assured in a private, non-class action. We are convinced that a plaintiff like Lasso may assert such a Title VII claim in a case like this.
>
> In *Rule v. International Association of Bridge, Structural and Ornamental Ironworkers,* 568 F.2d 558, 566 (8th Cir. 1978), a Title VII class suit was brought but was treated at trial as one involving individual claims. The Eighth held that the district court applied the wrong standard of proof from *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), instead of that from *Griggs,* which was proper for a disparate impact

> case. The court of appeals stated that "[w]hen such a challenge is made, in either an individual suit or a class action, the claim should be judged according to the standards set forth in *Griggs.*" *Rule, supra,* 568 F.2d at 566. Moreover in *Connecticut v. Teal,* 457 U.S. 440, 455-56 (1982), the Supreme Court stated that "[e]very individual employee is protected against both discriminatory treatment and practices that are fair in form, but discriminatory in operation.'" (*emphasis in original*) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431) (1971).

Petitioner does not address this statement by the Court, it simply cites wording from *McDonnell Douglas,* out of context, using the phrases "private" and "non-class". Looking again to *Teal, supra,* it is important to distinguish between the fact that a group has been injured, and that

> the fact remains however, that irrespective of the form taken by the discriminatory practice, an employer's treatment of other members of the plaintiff's group can be "of little comfort to the victims of . . . discrimination".

Id. at 455.

It is clear that "every *individual* employee is protected against both discriminatory treatment and "practices which are fair in form, but discriminatory in operation." *Id.* at 456.

II. Is A Subjective Selection Process Used In Promotion A "Facially Neutral" Mechanism Within The Meaning Of The Disparate Impact Cause Of Action?

Petitioner argues that in this action there was no such:

> [T]est, employment requirement standard or condition operat(ing) to classify Hispanics as ineligible for promotion or bar(ring) Hispanics from the state manager's position.

Pet. at 15. The basis for this contention seems to be the lack of a particularized criteria such as a specific scored test, or a height and weight specification. Thus, Petitioner suggests that a subjective evaluative process may be maintained without regard for the degree of disproportionate impact created thereby. Petitioner would therefore argue that if an employer's selection tests created an actionable impact, the employer need only switch to a wholly subjective process notwithstanding the fact that the identical effect remained.

In support of this position, Petitioner incorrectly cites *Furnco Construction Corp. v. Waters,* 438 U.S. 567 (1978) for the proposition that a subjective hiring criteria was appropriate even where "statistics at trial showed a low percentage of black bricklayers in (Employer's) workforce." This error in reading *Furnco* highlights Petitioner's misunderstanding of disparate impact. At trial, the facts were "not in serious dispute." *Id.* at 569:

> [T]here was *no evidence* that these policies and practices . . . had a disproportionate impact or effect on black bricklayers. From late 1969 through late 1973, 5.7% of the bricklayers in the relevant labor force were minority group members (*citations omitted*) while, as mentioned before, 13.3% of the man-days worked by black bricklayers.

Id. at 571-2. (*Emphasis Added.*)

In fact, section C of the Court's decision in *Furnco* directly supports respondent. In stating that a racially balanced "effect" cannot immunize an employer from "liability for specific acts of discrimination," the Court recognizes that the two actions (impact and treatment) are independent of one another. The existence of a balanced

workforce is expressly what removed *Furnco* from the realm of impact analysis. In *Wright v. Olin Corporation,* 697 F.2d 1172 (4th Cir. 1982) the court dealt with "semantic quibbling" surrounding the definition of "neutrality". It held:

> (w)hile the "facial neutrality" of (employer's program) might be subject to logical dispute, the dispute would involve mere semantic quibbling having no relevance to the underlying substantive principle that gave rise to this theory. That principle, one of profound importance in the evolution of Title VII doctrine, has as its critical feature the *consequences of employment policies rather than the "neutrality" with which the practices happen to be formally expressed.* . . . While the principle was first recognized in a context where as a matter of formal expression the challenged practice happened to be "facially neutral" in the most obvious sense of the term, it has been long applied that the "facial neutrality" was only superficial in view of the palpable correlation between the (protected classification) of the employees and its manifest consequences. (*Emphasis Added*)

Id. at 1186. Thus, Petitioner insists that a subjective process is, *per se,* not facially neutral. It seeks to immunize a method which this Court has repeatedly noted as suspect, while subjecting the more reliable, objective methods to a higher level of scrutiny.

Petitioner presses on with this misunderstanding in relying upon *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981). Petitioner points to that case as being "strikingly similar to the facts in this case". Petitioner either misses or ignores the critical issue.

Burdine is *clearly* an action involving disparate treatment only. There was no evidence, as there is in this

action, that the selection mechanism had drastically affected an entire class of persons over a long period. There was no allegation that Ms. Burdine was adversely affected *along with a great number of other females.*

Similarly Petitioner cites *United States Postal Service Board of Governors v. Aikens,* — U.S. —, 75 L.Ed.2d 403 (1983) to support this argument. The Petition states that:

> [E]mployee claimed that the Postal Service had discriminatorily refused to promote him to higher positions. The Court held, consistently with Woodmen's contention herein, that an employee who has shown only that he was a minority, that he applied for a promotion for which he possessed the minimum qualifications, that the employer selected a nonminority applicant, and that white persons were consistently promoted and detailed over him *and all other black persons,* established a prima facie case of disparate treatment, not disparate impact. 75 L.Ed.2d at 409. Specifically, the Court stated that: [W]e have consistently distinguished disparate treatment cases from cases involving facially neutral employment standards that have disparate impact on minority applicants." 75 L.Ed.2d at 409, n.1.

Pet. at 19 (*Emphasis Added*).

What that decision, and the findings of the lower courts in that case do not reveal, is *any* contention that the selection process had resulted in a disproportion in the racial make-up of persons ultimately holding the higher position. If we were to assume, for the sake of argument, that Aikens had shown that 65% of all qualified applicants for the position were black, and that because of the hiring process only 5% of black applicants were hired, that action would fall within the confines of the Griggs analysis.

Finally, we arrive at the Petitioner's analogy between this action and this Court's decision in *Ford Motor Company v. Equal Employment Opportunity Commission*, 458 U.S. 219 (1982). Using that action, whose central issue was accrual of back-pay, Petitioner seeks to construct a curious tautology: Because the action was brought by three individuals, and because the case involved an allegation of some general effect on a protected group, and because the Court utilized the disparate treatment analysis; therefore, all suits by individuals alleging some general effect on a protected group *must* be analyzed under the disparate treatment theory. Pet. at 20. This absurdity ignores three salient facts regarding *Ford*.

First, the plaintiffs in *Ford elected* the disparate treatment cause of action because it was clear that intent could be shown, and because of the effect on damages. *Id.* at 224 n.7. Second, it was the employer, and not the plaintiffs, who attempted to argue that the disparate treatment allocation could not be elected in that action—Plaintiffs never sought to invoke the disparate impact theory. *Id.* at 225 n.7. Finally, plaintiffs, having already sustained the burdens necessary to demonstrate intent, were seeking relief under a discretionary statute which required them to show:

> [R]espondent has *intentionally* engaged in or is *intentionally* engaging in an unlawful employment practice charged in the complaint.

Id. at 225 (*Emphasis Added*). It is clear that where damages are discretionary, and where the relief statute speaks to intent, plaintiffs would demonstrate intent if possible.

Thus, the core of Petitioner's argument on "neutrality" seems to rest on the premise that because there was no specific identifiable item such as a "test", the selection process is immune from challenge *regardless of the disproportionate impact it might create.* We return to the sematic quibbling discussed above, while the simple fact is that people are clearly being injured by a *process* used regularly by the employer. In *Connecticut v. Teal,* 457 U.S. 440 (1982) this court abandoned artificial distinctions relating to "where," in an employment process discrimination occurs.

> The statute speaks not in terms of jobs and promotions, but in terms of *limitations* and classifications that would deprive any individual of employment *opportunities.*

Id. at 448. (*Emphasis in the original*).

This reiteration of the correct focus—the focus on *effects* of actions is the critical point, for it illustrates that any "job-related *barrier*" which has a significant adverse effect, and acts to "deny a minority or woman employment or promotion" is prohibited because it is depriving individuals of opportunities. *Id.* at 447-8. Although *Griggs* spoke to facially neutral activities having an adverse impact, this is not license to employ wholly subjective promotion processes to circumvent "Congress' primary purpose . . . the prophylactic one of achieving equality of employment "opportunities" and removing "barriers". *Id.* at 449. Rather, it is clear that those become the same neutral policies which, if they create headwinds, are prohibited.

III. Where A Subjective Process Denies An Employee A Promotion, Is That A "Routine And Regular" Policy Where Said Process Has Been Used More Than 55 Times By Employer In The Relevant Time Frame?

Reliance upon *Coe v. Yellow Freight System*, 646 F.2d 444 (10th Cir. 1981) to advance this point is misplaced. The *Coe* court did not find that a disparate impact action was unavailable to an individual as opposed to a class. Nor did the court hold that an individual injured by a specific act had to show he was injured by a number of acts *himself*. Rather, the court stated that the *cause of action* cannot be based on "one isolated incident". *Id.* at 451. In that case, plaintiff specifically did not allege:

> that the company systematically followed a practice or procedure for hiring safety managers which is discriminatory in effect,

Id. at 451.

The court went on to note that the *mode* or method used in filling a position cannot give rise to disparate impact by itself—there must be an allegation of discriminatory effect. In the instant case, respondent did not argue below that the subjective and questionable methodology was, *per se*, actionable. It only became so when it resulted in a statistical disparity in hires: No Hispanics selected in California, Arizona, New Mexico or Texas from pool of over 40% Hispanics (Tr. at 259-263); no Hispanics ever in New Mexico despite over 40% in the underlying workforce of employer from which the position was drawn, (Tr. 97); and of 55 state managers since 1975, none were Hispanic. Pet. App. A5.

Nor are the citations in the Petition to either *Cooper v. Federal Reserve Bank of Richmond*, *supra*, or *Goff v.*

Continental Oil Co., 678 F.2d 593 (5th Cir. 1982) particularly applicable. In both of those cases, plaintiffs alleged a small number of unrelated incidents to bolster the argument that employers had intent to discriminate. In *Goff* which arose under 42 U.S.C. § 1981, not Title VII, it was necessary to show intent. Thus, Petitioner erroneously relies on this case. Even if one were to apply *Goff*, it does not support Petitioner. The decision holds only that a series of unrelated incidents submitted only to show animus, does not demonstrate intent necessary for pattern and practice.

Respondent submits that this argument is absurd on its face. An injured individual, bringing a disparate impact action, will always allege a single ***individual*** act which places him in the group that has been adversely affected. That is the means by which he establishes his membership in that group. It is not that the act done to him was "one isolated incident" which is operative. It is, rather, the fact that that same act has been repeated a large number of times over a long period with adverse effects on one group. That is exactly the situation in the cast at bar. Certainly Respondent was only made a victim of this activity once. But the sheer numbers of state managers selected in the relevant time frame, from the relevant qualified population, certainly takes this action out of the realm of an "isolated incident."

In conclusion, it seems clear that there was sufficient evidence heard by the trier of fact that:

a) There was a neutral employment mechanism

b) That over a wide-sweeping range of hires, and through a number of years that mechanism had an

adverse effect on Hispanics and the cumulative effect of these identical actions resulted in the effect claimed,

c) That Respondent was, as a member of that minority group, among those allegedly injured.

d) That Respondent has the right to assert an injury done to him in any procedural manner open to him under The Federal Rules of Civil Procedure, and is not required to file a class action.

IV. As A Matter Of Fact, Did Respondent In The Instant Case Present A Disparate Impact Case, Or A Pattern And Practice Case.

In section 2 of its Petition Woodmen simply confuses "pattern and practice" actions with those brought under the disparate impact theory. While it is true that:

> A pattern or practice disparate treatment case shares with a typical disparate impact suit the proof that an employer's practices have had a systemic adverse effect on members of a protected class. However, in "pattern or practice" cases, unlike disparate impact cases, the burden imposed on the employer to rebut the plaintiff's prima facie case is satisfied if the employer articulates some legitimate, nondiscriminatory reason for the employee's rejection. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977): Hazelwood School District v. United States, 433 U.S. 299 (1977); McDonnell-Douglas Corporation v. Green, 411 U.S. 792, 804-805 (1973).

Pet. at 27, the difference between the two actions—and thus the correct allocation of proof and burden—is not founded in the use or lack of use of statistics, but rather is the ultimate aim of such proof. In "pattern and practice" actions, the statistics are only one component in showing an overall intent or discriminatory animus. In such cases, the statistics by themselves do not sufficiently dem-

onstrate the "effect" required in impact cases. In *Hazelwood School District v. United States,* 433 U.S. 299 (1977), the extent statistics did not by themselves show systemic discrimination that would have been necessary for disparate impact. It was, therefore, necessary to reach the higher plateau of showing intent, by demonstrating several other factors (history of overt discrimination, 55 specific incidents, etc.). The instant case does not present a diffused "statistical pattern of discriminatory decision-making," coupled with sporadic acts of discrimination, but rather a specific procedure, a specific position, and the exclusion of a specific minority group in significant numbers. This by definition is disparate impact. The burden in this action is now on the employer, and rightly so. It must show that the offending process is reasonably necessary, and that no less offensive process may effect the desired ends of Petitioner.

—o—

CONCLUSION AND PRAYER

As stated below, Respondent respectfully submits that this action presents no matter which would require this Court to issue a Writ of Certiorari. Respondent also submits that Petitioner's phrasing of the issues in its Petition seeks to obscure the fact that the Circuits are uniform in their correct treatment of the central issues presented.

For these reasons, and pursuant to the arguments presented above, Respondent prays this Court to deny the Petition.

Respectfully submitted,

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